

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 16, 2005 Session

DOREEN PEREZ (KORNBERG) v. MITCHELL E. KORNBERG

**An Appeal from the Circuit Court for Davidson County
No. 97D-2940 Judge Carol Soloman, Judge**

No. M2004-01909-COA-R3-CV - Filed on June 5, 2006

This appeal involves a petition to modify custody and for criminal contempt. The parties were divorced in 1998, and they agreed that the mother would have custody of the parties' two children. The mother moved to New York after the parties divorced. Three years later, the trial court entered an agreed order giving primary custody of the children to the father, who still lived in Tennessee. While the father had custody, the mother traveled from New York to visit the children. The parties remained cooperative with each other until the father remarried. After that, the parties' relationship began to decline. The mother claimed that the father interfered with her visitation with the children and otherwise attempted to alienate the affections of the children. Finally, the mother filed a petition to change custody and for criminal contempt against the father for his interference with her court-ordered visitation. After a hearing, the trial court changed custody to the mother and found the father guilty on three counts of criminal contempt. The father now appeals. After a careful review of the record, we affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

James Robin McKinney, Jr., Nashville, Tennessee, for the appellant, Mitchell E. Kornberg.

Donald Capparella, Nashville, Tennessee, for the appellee, Doreen Perez (Kornberg).

OPINION

Plaintiff/Appellee/Cross-Appellant Doreen Perez (Kornberg) ("Mother") and Defendant/Appellant/Cross-Appellee Mitchell Kornberg ("Father") were divorced by final decree on January 14, 1998. The final decree incorporated a Marital Dissolution Agreement ("MDA") in which the parties agreed that Mother would have sole custody of the parties' two children, Stephanie M. Kornberg (born July 2, 1994) and Olivia R. Kornberg (born October 16, 1995). Father was given

“reasonable visitation privileges” with the children, provided that he gave Mother twenty-four hours notice. Mother and the children lived in New York, while Father lived in Nashville, Tennessee. On January 11, 1999, the parties entered into an agreed order giving the parties joint custody of the children, with primary custody remaining with Mother.

On June 13, 2001, the parties entered into another agreed order designating Father as the primary residential parent, with the children living in Tennessee. The parties entered into a parenting plan that was incorporated into the agreed order. After Father was designated primary residential parent, Mother periodically visited the children in Tennessee. For about a year, the relationship between Mother and Father remained amicable, and they cooperated with each other for the benefit of the children.

In June 2002, Father married Tammy Kornberg (“Stepmother”). By the fall of 2002, the parties began to have disagreements regarding visitation, and their relationship declined.

On March 14, 2003, Mother filed a petition for contempt against Father and for a change of custody. Mother alleged in her petition, among other things, that Father refused to comply with the terms of the parties’ parenting plan by continually interfering with her in-person visitation and telephone visitation with the children. She asserted that Stepmother had refused Mother telephone access to the children and had otherwise interfered with Mother’s telephone visitation. Mother alleged thirty-six counts of criminal contempt against Father. The matter was eventually set for a hearing.

Prior to the hearing, on May 13, 2003, the trial court entered an agreed order setting out a visitation schedule for the children through the summer of 2003. Between entry of the May 2003 order and the date of the hearing on Mother’s petition, the parties had several interim disputes over visitation. These matters were resolved either by the trial court, by agreement of the parties, or both. The parties were ordered to engage in mediation, which was unsuccessful.

On August 8, 2003, the trial judge, Judge Marietta Shipley, conducted a hearing on the parties’ various outstanding motions. On October 7, 2003, the trial court entered an order on the parties’ outstanding motions which required both parents to (1) refrain from discussing the custody case with the children, (2) refrain from talking negatively to the children about the other parent, and (3) refrain from interfering with the children’s use of the telephone to call either parent. The trial court also resolved additional disputes over visitation, including allowing the children to participate in Mother’s wedding in October 2003 to Chuck Gruber (“Stepfather”). The trial court ordered the exchange of the children to be “as tranquil, uneventful, and normal as possible.”

Meanwhile, on September 12, 2003, the trial court conducted another hearing on the parties’ outstanding disputes. An order on these matters was entered on October 20, 2003. The trial court ordered psychological evaluations for the children, the parties, and the parties’ spouses. The trial court required that Father be “solely responsible for ensuring that the children speak with [Mother] on a daily basis,” and that Father make available a fully-charged cell phone for this purpose. Father

was specifically ordered to direct Stepmother not to touch the cell phone and “not to interfere, in any way whatsoever, with telephone access between Mother and the minor children” The trial court emphasized in its order that “[t]elephone calls should not be an issue in this Court again.”

Despite this order, Mother asserted that Father and Stepmother continued to interfere with her telephone visitation. The trial court conducted another hearing on October 31, 2003, and later entered an order requiring Father to “make certain that the children talk to their mother by telephone prior to 8:30 p.m. on Sunday, Tuesday, and Thursday of each week,” with no interference or time limitations on the calls. The order stated that the children “shall be allowed to telephone their Mother at any other times and Mother shall be allowed to telephone the girls at any other times without interference from Father or any other member of the children’s household.” Mother’s visitation was also modified to allow her to visit her children in Tennessee, on two-weeks’ notice, from Thursday evening until the following Monday morning, when she was to bring them to school.

On January 8, 2004, the trial court entered another order requiring that the court-ordered psychological evaluations of the children, the parties, and their spouses be performed by clinical psychologist Francis Joseph McLaughlin, Ph.D. (“Dr. McLaughlin”). The order also reiterated the earlier admonitions on Mother’s telephone visitation with the children.

Effective January 2004, the case was transferred to a different division, with Judge Carol Soloman presiding.

On February 27, 2004, Judge Jack Norman, Jr., substituting for Judge Soloman, held another hearing on Mother’s telephone visitation. On March 9, 2004, yet another order was entered, enforcing Mother’s telephone visitation with the children. The order contained language similar to that in the previous orders, making it Father’s sole responsibility to ensure that the children speak with Mother on the designated cell phone on certain days, and that the children be allowed to call her any time. This order added that “[n]on-compliance and/or interference with telephone visitation shall be deemed serious and subject the non-complier with contempt of Court.”

On April 2, 2004, Mother filed another petition for criminal contempt against Father, alleging ninety-three (93) counts of contempt, primarily related to Father’s and Stepmother’s refusal to abide by the previous court orders regarding telephone visitation. The petition was amended on April 8, 2004. Mother’s petition detailed six previous motions filed by Mother wherein she alleged that:

1. Along with Stepmother, Father has continued, despite court orders, to deny telephone access between Mother and the children, including hanging up on her and telling her not to call the Kornberg home.
2. They have interfered with holiday visitation and restricted Mother’s contact with the children at school and during sports.
3. Father has failed to allow the children to visit Mother in New York since June of 2002, unilaterally requiring all visitation to be in Tennessee.

4. Father has failed to share in the costs of transportation for visitation, in direct violation of court orders, and
5. Father has completely excluded Mother from all major decision-making regarding the children's life, despite their status as joint custodians of the children.

On April 12, 2004, Judge Soloman held a hearing on Mother's contempt petition. On April 19, 2004, Judge Solomon entered an interim order stating, among other things, that "Father shall cease and desist any and all defiance of prior court orders. Father shall fully comply with the orders of this Court and any failure to fully comply shall result in punishment for contempt." The trial court set the matter for a full hearing on June 14, 2004.

On May 7, 2004, Mother filed a motion to strike the psychological evaluation of Dr. McLaughlin, claiming that his conclusions were not based on accurate or comprehensive background information. Mother attached her own affidavit in support of the motion. Also on May 7, 2004, Mother filed a motion to add Stepmother as a third-party defendant. On May 10, 2004, the trial court entered an agreed order dismissing counts one through twenty-five of Mother's petition for contempt. Father denied the remaining charges of contempt.

On June 4, 2004, Mother filed a motion for permission to amend her petition for criminal contempt. Mother's amended petition included twenty-three (23) additional counts of contempt, citing incidents in which Father allegedly had either denied or failed to ensure telephone visitation with the children. She also sought weekend visitation with the children while she was in Nashville for the June 14 hearing.

Also on June 4, 2004, Father filed a motion to dismiss Mother's petition for contempt and for a change of custody. Father asserted the doctrine of unclean hands, claiming that Mother had perjured herself in the affidavit filed in support of her motion to strike the psychological evaluation reports of Dr. McLaughlin.

Shortly before the scheduled hearing, Father filed a motion in limine, seeking to prevent Mother from presenting any proof at the hearing because she had failed to file a parenting plan with the trial court pursuant to T.C.A. § 36-6-404(c)(3). Eventually, Mother filed a proposed parenting plan. Without ever expressly ruling on Father's motion, the trial court implicitly denied it by allowing Mother to present evidence at the hearing.

The hearing commenced as scheduled on June 14, 2004. Mother testified at the outset. As background, Mother testified that she and Father were both born in Seaford, New York (on Long Island), and that both the paternal and maternal grandparents still live there, two blocks away from each other. Mother and Father lived with the children in Tennessee while they were married, but Mother moved back to New York with the children when the parties separated. In June 2001, the parties agreed to transfer primary custody to Father, because at that time Mother planned to move back to Tennessee. Mother described her relationship with Father during this time period as amicable, and said that Father was a "good father" before their more recent problems began. She said

that the parties attempted to show the children a “unified front” despite the divorce, and that she even stayed with Father and the children in their home when she visited them in Tennessee.

Mother said that after Father remarried in June 2002, Stepmother and her son began to live with Father. After Father remarried, Mother stayed with her friend, Angela Brewer, when she visited Tennessee. In August 2002, Father and Stepmother took Mother and Stepfather to dinner in Tennessee to discuss matters regarding the children, and the parties were able to get along well. Later, however, in September 2002, Father requested that the children be permitted to come to a birthday party at his house on a Sunday when Mother had visitation through Sunday. Mother refused Father’s request. As a result, on that Sunday, Father called the police and reported that the children did not return home as planned. While Mother was out with the children, a police officer identified Mother’s car, pulled her over, and asked for the children by name, stating that their father reported that they had not returned home. Mother explained to the police officer that she was the children’s mother, and the officer allowed her to keep the children. On Monday, Mother returned the children to Father as previously scheduled.

After this incident, Mother testified, she was no longer welcome in the Kornberg home, and she began having difficulties reaching the children on the telephone. She explained that, when she called the direct line to the Kornberg home, either no one would answer the phone, or Father and Stepmother would hang up on her or tell her that she could not speak to the children. In January 2003, Mother traveled to Tennessee to visit the children, and, she said, Father would barely speak to her.

In February 2003, Mother sought legal counsel to enforce her visitation rights under the parenting plan. Shortly thereafter, the parties had a dispute concerning where the children would be during their spring break. Mother said that this dispute led her to file a second petition, the petition for contempt and a change of custody which is the subject of this litigation. Mother testified that Father continued to deny her telephone access to the children, and he would not allow her in his home. When Mother traveled to Tennessee for visitation, Father required that she pick up the children at a neutral location, rather than at his house. At times, she said, police officers were present at the locations where she would pick up the children.

Mother testified that the children became very nervous. She said that, although they were relaxed when they were with her, they did not want her out of their sight. On one occasion, Mother noted, the older daughter did not want to board the airplane to come to New York to visit her, but was happy to be with Mother once she arrived in New York.

Initially, Mother testified, the parties agreed on the terms of the May 13, 2003 order, wherein Mother was to obtain a cell phone for the children, so that the girls would be able to communicate with Mother at any time. Unfortunately, Mother said, nothing was resolved. Mother stated that she had to file repeated motions to enforce her rights under the agreed May 13, 2003 order. Mother’s

counsel entered into evidence recordings of the parties' conversations regarding the matter.¹ In one recording, Mother attempted to call the children several times, but they did not answer their cell phone. On February 15, 2004, Mother called Father directly. He would not allow the girls to speak to her, told Mother that they were "not really ready right now," and indicated that he needed to protect them from her. Eventually, Father told Mother he wanted them to communicate only through e-mail. Mother resisted this, protesting that she was not proficient on the computer, and that communication by e-mail was not acceptable to her in all situations.

Mother testified that, when the girls flew from New York to Tennessee, Mother would call Father to let him know that they had boarded the plane safely. Father would not respond in kind, and did not call Mother to let her know that the girls had safely arrived in Tennessee. On one occasion, Olivia called Mother to let her know that she arrived safely in Tennessee, but she had to hide from Father the fact that she had called Mother.

After the girls' first visit to Mother in New York, Mother accompanied the children home and spent the night in Tennessee. That night, Stephanie called Mother, crying and telling Mother that she missed her. Mother called Father to see whether she could have lunch with the children before she returned to New York the next day, but Father would not permit it.

Mother testified that Father had failed to inform her of important school events, such as a soccer party and a Christmas play, and that he refused to allow her extra visitation with the children when she came in town for court proceedings. When Mother called Father's home to arrange for such visitation, Stepmother told Mother never to call unless it was an emergency.

In the latter part of 2003, Mother said, Father and Stepmother relocated their residence. She said that Father would not give her their new address until Mother filed a motion asking the court to compel him to provide the information. Olivia's birthday was during that interim, and Mother had to mail Olivia's birthday gift to her at the school. At the hearing, Mother played a recording of her unsuccessful attempt to contact Olivia by telephone on her birthday.

Mother testified that she makes efforts to encourage the children's relationship with Father and Stepmother. For example, Mother said, on one occasion she has had the girls make Father and Stepmother pottery for Valentine's Day, stating that it was important for the children to make them gifts. On one occasion prior to his remarriage to Stepmother, Mother said, Father had the girls send her a teapot for Mother's Day. Other than that, she said, Father did not ever have the children send Mother anything for her birthday, Mother's Day, or any other holiday. Mother said that if she were designated primary residential parent for the girls, Father could have visitation "whenever he would like to." Mother expressed concern about Stepmother's care of the children, noting that Olivia told her that Stepmother had once left the children alone in a pet store while she went to a nearby tanning bed.

¹The trial court noted that the recorded conversations reflected that the parties both "knew what buttons to push" to anger the other.

Mother testified about the school that the children would attend if they moved to New York to live with her and Stepfather. She said that she and Stepfather have a two-bedroom apartment less than a mile from the school, but they planned to purchase a larger home if she were designated primary residential parent for the children. Mother said that she is a hairdresser by trade, but would stay at home with the children if she were the primary residential parent.

Mother acknowledged that Stephanie had told Dr. McLaughlin that she wanted to remain in Tennessee with Father. Mother denied punishing Stephanie by not speaking to her or treating Olivia with favoritism.

Mother noted that her parents, her in-laws, Father's parents, and other extended family members live near her home in New York. Mother said that, when the children were in New York, they would spend time with her family, and that she also takes the girls to visit Father's parents. In contrast, she said, when Father was in New York with the girls visiting his parents, he made no attempt to have the girls see Mother or her parents.

In support of her contempt petition against Father, Mother observed that every order entered by the court since September 2003 had required Father to ensure that Mother had telephone visitation with the children on certain days, and had also stated that the children were permitted to telephone Mother at any time on the designated cell phone. Despite these orders, Mother claimed, on a number of occasions she made attempts to reach the children by telephone, but was put through to voice mail. Mother testified that she began keeping a record of her attempts to contact the children by telephone and entered into evidence a log of telephone calls, as well as tape recordings of several unsuccessful attempts to call them. She said that the children sometimes called her in the morning around 6:30 a.m. Central time, which she said was too early in the morning to have a meaningful conversation with them. The primary basis for her contempt petition was several occasions on which the girls did not call her at all.² Mother testified that sometimes, when she could not reach the children on the designated cell phone, she would call Father's land line telephone. When either Father or Stepmother answered the phone, they would tell her not to call their house, and then hang up on her. In a recorded conversation on March 29, 2004, Father apparently took the phone out of Olivia's hand and, over Mother's protests, hung up the phone. Counsel for Father stipulated that Father had committed this act of contempt.

Stepfather also testified at the hearing. He said that he had lived in the same area of New York all his life, and that his mother lived nearby. At the time of trial, Stepfather was employed as a vice-president of U.S. Globe Corporation, earning \$123,000 per year. Stepfather said he supports Mother's efforts to be designated primary residential parent of the children, and that, if she were primary residential parent, he was willing to move into a larger home and support them all. Stepfather was aware of Mother's difficulty with trying to reach the children by telephone, and he had

²On cross-examination, Mother was asked about certain days when she claimed she had not spoken to the children, when in fact her phone records showed that such contact had been made. Mother admitted that she may have been mistaken on those occasions.

first-hand knowledge of occasions on which Stepmother hung up on Mother and spoke to her in a derogatory manner. Stepfather explained that he took “a back seat role” in the situation between Mother and Stepmother.

Father testified as well. He said that he and Mother moved from New York to Tennessee in July 1993; at that time he became a police officer with the Metro Nashville Police Department. His normal working hours were from 7:00 a.m. to 3:30 p.m., basically working while the children were in school, and earned between \$48,000 and \$50,000 per year. Father said that he considers himself to be a Jewish/Christian, and that he and the girls regularly attend a Baptist church when Mother is not visiting. Father said that the girls ride in a carpool to school, and that Stepmother picks them up from school. The children play soccer and had belonged to a gymnastics club. He said that the family has dinner together every night, except on nights when Stepmother goes to her job at a restaurant.

In his testimony, Father was asked about Stepmother’s past substance abuse. He said that he and Stepmother initially dated before he had custody of the girls, from July 2000 until February 2001. They apparently stopped dating for a period of time. At some point, Father learned that Stepmother had a “severe drug problem,” and helped her deal with her problems. In March 2002, Father and Stepmother resumed their romantic relationship. Father was aware of Stepmother’s past difficulties; that she had been arrested, had been homeless, and had been sexually abused and robbed. However, after they began dating again, Father said, he saw no evidence of Stepmother using any sort of illegal narcotic. He said that Stepmother no longer had drug cravings, and he believed that she would not use drugs again. He admitted, however, that she occasionally drank alcohol. Father was aware of the incident in which Stepmother left the girls in a store while she went to the tanning bed. He said that he did not approve of Stepmother’s decision, and told her that “it was [not] a good idea.” He acknowledged that there was a lot of hostility between Stepmother and Mother, and admitted that Stepmother had sometimes hung up the telephone when Mother called.

Father was questioned about the allegations that he interfered with Mother’s telephone visitation. He said that the children have had a designated cell phone since July 2003. Father asserted that he keeps the cell phone charged, it stays in their room, and neither he nor Stepmother touch it. He maintained that he had never told the children not to call Mother. Father said that the girls sometimes turned the cell phone off because they did not want to talk to Mother, but claimed that he admonished them to keep it turned on. He admitted that there were occasions on which he prevented the girls from talking to Mother, and acknowledged that he sometimes did not answer his home phone if Mother called and the children were not there.

Like Mother, Father characterized the parties’ visitation as amicable at first. During that period, Father arranged and paid for Mother’s travel from New York and lent her his car when she was in town. He testified about the August 2002 dinner he and Stepmother had with Mother and Stepfather, remarking that they all “had a great time together.” In September 2002, however, Father became upset when Mother refused his request to bring the children to his house to celebrate Stepmother’s birthday. On another occasion in October 2002, Father said, Mother refused his request to bring the children to his home for Stepmother’s mother’s birthday while Mother was in town

visiting the girls. It was on this occasion, Father stated, that he called the local police regarding the children's failure to come home. The police told him that they would not intervene in the situation, and that it seemed to be "just a mother who wants to see her children." By coincidence, another police officer on duty overheard the report, and he pulled Mother over for a broken taillight. For a short time after these two incidents, Father testified, the parties were able to be friendly again. However, when Mother filed the first petition for contempt in March 2003, Father became angry at her and decided that he would permit Mother to visit the children strictly in accordance to the parties' parenting plan. At that point, he said, the two parties "dug in [their] heels" and it just "snowballed from there." He admitted that, after the petition for contempt was filed, he became angry and reduced Mother's contact with the children.

Father denied all ninety-three of Mother's contempt charges against him. Father admitted that on Thursday, November 20, 2003, he did not allow Mother to pick up the children, as provided in a court order. He explained that he was under the mistaken impression that Mother was not entitled to have the children until Friday, November 21. Thus, he claimed, his disobedience of the order in that instance was not willful.

Father was also asked about his behavior during a telephone call between Olivia and Mother on Monday, March 29, 2004, in one of the tape recordings Mother introduced into evidence. The order in effect at that time allowed Mother to call the children on Monday, not Tuesday. While Mother and Olivia were talking, Father asked Olivia whether she had placed the call to Mother. Olivia replied that she had not. Upon hearing Olivia's response, Father, who mistakenly thought it was Tuesday, grabbed the telephone from Olivia, told Mother that "this isn't your night to call," and hung up the telephone. When he realized that it was actually Monday, Father apologized to Olivia and had her call Mother back.

Father conceded that there were "[t]wo other times" that he did not allow Mother to talk to the girls on a day on which she was entitled to telephone visitation, but he only elaborated on one of them. Father acknowledged the recorded telephone call between Mother and him on Sunday, February 15, 2004, in which he would not allow Mother to speak to the children, even though it was her designated night to call under the order. He explained that Mother had visited with the children over the weekend and had taken them to see the psychologist, Dr. McLaughlin. When the children returned home to Father, Stephanie had described the weekend as "torture," and told Father that she had informed Mother that she wanted to live with Father in Tennessee. Stephanie said that, after that, Mother "punished" her by not speaking to her and by holding Olivia's hand but not hers. Father was angry, and he said that neither of the girls wanted to speak to Mother. Therefore, in order to protect them, he would not permit Mother to speak to them when she called on February 15, 2004.

Father said that the children should be able to continue living with him in Tennessee because he had provided them with a stable home for three years, they had many friends there in Tennessee, and they were happy living there. He indicated that the girls wanted to stay with him.

Stepmother testified as well. She is a nurse by profession. Stepmother was questioned extensively about her past substance abuse. She explained that her problems began when she was prescribed narcotics to treat pain from rheumatoid arthritis. She became addicted to the prescription medicine, and her physician discontinued her prescription. Still addicted, Stepmother began to buy the drugs off the street, sometimes using them intravenously. After she stole drugs from a hospital facility, she lost her nursing license. Stepmother checked herself into a treatment facility for detoxification, but nevertheless continued to abuse drugs. Within a couple of months, she was recommitted to a different facility, still with no success.

Stepmother's situation became even worse when, while trying to buy drugs in the projects, she was taken to a hotel room and was sexually abused repeatedly for three days. During this episode, she was given crack cocaine. Subsequently, Stepmother began using that drug as well. Sometime after the hotel room incident, Stepmother checked herself into a facility for two weeks for detoxification, and then immediately transferred to a rehabilitation facility for an additional four weeks. Despite this intense treatment, after she was released, Stepmother again relapsed. Ultimately, Stepmother became homeless, living on the streets of Nashville, and was arrested for prostitution, auto theft, and other offenses.

Finally, in December 2001, Stepmother's situation improved when she moved in with a friend, got a job, saved some money, and purchased a car. At that point, Stepmother resolved to stop using drugs. By the time of the hearing, Stepmother had not used a narcotic since June 2001, and had not used crack cocaine since December 2001. She testified that she had no cravings for drugs, and that God had given her the inner strength to conquer her addiction. She acknowledged occasionally drinking alcohol, but maintained that she is no longer a drug addict.

Stepmother testified that she has a good relationship with the girls. She said that they asked her if they could call her "mom," but that she had declined and told them that Mother would not appreciate it. She said that Stephanie often told her that she wished that she were her mother. Stepmother's previous husband, who had custody of Stepmother's son while she was homeless, returned custody of their son to Stepmother in the summer of 2002. Stepmother testified that she and her former husband had always been able to work together in the best interest of their son without resorting to the courts.

Stepmother acknowledged that she needed to work with Mother. She conceded that she had made mistakes out of frustration. She admitted that she told Mother not to call her house, and that she had on occasion hung up the phone on Mother. She explained that she did not realize that she was violating a written court order. Stepmother admitted that she left the children, along with two other children, in the pet store while she went to the nearby tanning bed. She said that she was in the tanning bed facility for only four minutes, and asserted that she knew the owners of the pet store.

The psychologist, Dr. McLaughlin, also testified. Pursuant to the trial court's order, he performed an evaluation of the children, meeting with them both together and separately. He also met with Father, Stepmother, and Mother and gave the parties and their spouses questionnaires to

complete. He spoke with Allie Bender (“Dr. Bender”), the school psychologist, for both girls. He reviewed report cards and other records from the children’s school.

Dr. McLaughlin determined that Stephanie was essentially a normal child who has adjustment issues due to the divorce of her parents. Stephanie exhibited significant anxiety on a variety of issues, and had a slight facial tic. She told Dr. McLaughlin that she did not want to return to New York, and that she did not want to return to his office with Mother. Stephanie indicated that, as punishment for her choices, Mother sometimes did not talk to her. The records showed that Stephanie did well in school, and that she did “dramatically” better in Tennessee than she had done in New York.

The psychological findings on Olivia were similar to those regarding Stephanie. Dr. McLaughlin found Olivia to be a normal child having difficulty with her parents’ post-divorce conflict. Olivia, however, did not have the same degree of anxiety as Stephanie. Olivia was ambivalent about whether she preferred to live in Tennessee or New York, and she felt a need to please all parties. Dr. McLaughlin noted that when the girls lived in New York with Mother, Olivia was not yet school age, so he could not compare how she did in school in each location. He noted, however, that Olivia was doing well in school in Tennessee.

Based on Stephanie’s relatively better school performances in Tennessee, where she is “functioning fairly well,” as well as her stated preference to stay in Tennessee, Dr. McLaughlin opined that Stephanie should stay in Tennessee with Father. He also felt that the children should not be separated. Thus, because the children were thriving in Tennessee, Dr. McLaughlin recommended that they both remain in Tennessee with Father.³

The trial court asked what Dr. McLaughlin would recommend in a situation where “the father and his new wife do everything possible . . . to impede the relationship with the natural mother and the children.” Dr. McLaughlin responded, “[I]f that is the case, you’ve got a real problem to solve here.” In general terms, Dr. McLaughlin stated that conflict between divorcing parents is the single most important factor in a child’s adjustment. The trial court further asked Dr. McLaughlin, “How much damage will it do to the children if I return them to New York?” Dr. McLaughlin responded that he “didn’t really assess that question I think these are essentially healthy girls who could make such an adjustment. . . . Separating the mother from the children is detrimental, there’s no question.” Regardless, he maintained that the girls should stay in Tennessee, where they seemed to be thriving, because “[a]ll of the alternatives are . . . problematic.”

³Dr. McLaughlin acknowledged that his recommendation was based, in part, on his conversation with the school psychologist, Dr. Bender. In Mother’s affidavit to strike Dr. McLaughlin’s report, Mother denied his statement that she had walked out on a session with Dr. Bender. Mother asserted that Dr. Bender had told her to stay away from the children because her visits upset them. Dr. McLaughlin responded that the assertions in Mother’s affidavit did not “sound like the Dr. Bender I know,” and that he knew Dr. Bender to be an ethical and reasonable person. Dr. McLaughlin said that he was unaware that Dr. Bender had not had a full “session” with Mother, only a brief encounter at the children’s school when Mother was visiting.

On July 29, 2004, the trial court entered an order on Mother's petition to change residential placement and hold Father in contempt of court. The trial court found a material change in circumstances necessitating an alteration in the custody arrangement and concluded that "[i]t is in the best interest of the children in the case to change the custody arrangement to equally divided parenting time." In light of the budget crisis in Tennessee, the trial court acted under the assumption that "the New York Public School System is currently superior to the Tennessee Public School System." In light of this, the trial court placed the children with Mother for the fall semester. The trial court also found that Father and Stepmother "have advertently attempted to alienate the affection of the children from their biological mother," and that "this behavior is detrimental to the healthy development of these children. . . . Mother's visitation has been stymied by Father and her telephone visitation has been curtailed way beyond the Court Orders." On the other hand, the trial court also determined that "the pressure that the Mother has placed upon the children to demonstrate their love and loyalty to her is also detrimental to the healthy development of these children." In light of these findings, the trial court determined that the children should split the school year and share summers equally between Mother and Father. The trial court specifically ordered that there would be three twenty-minute telephone visitations per week on Sunday, Tuesday, and Thursday with the non-custodial parent, and ordered that the calls be recorded. The trial court also found Father guilty of three counts of criminal contempt and sentenced him to ten days in prison for each count. However, the trial court suspended his sentence with the proviso that, if Father fully complied with the trial court's orders, the convictions would be dismissed and the record expunged within one year.

Both parties were unhappy with the trial court's decision, and both filed motions to alter or amend. In her motion, Mother requested that, rather than the split-schedule parenting, the trial court allow her to be the primary residential parent for the school year and allow the children to reside with Father during July and August. In his motion to alter or amend, Father asserted that the trial court erred in dividing the residential placement of the children and that there had been no material change in circumstances sufficient to justify modification of the custody arrangement. He asked the trial court to allow the children to remain in his custody, with Mother having extended visitation over the summer.

On September 10, 2004, the trial court conducted a hearing on both parties' motions to alter or amend. At the hearing, counsel for Mother notified the trial court that, contrary to the court's order, Father had enrolled the children in school in Tennessee for a short time. However, by the time of the hearing, the children had moved to New York and were attending school there in accordance with the order. After hearing argument from counsel for both parties, the trial court agreed that splitting the school year for the children had been a mistake, because it "may have been too much moving for those children" and did not provide them the stability they needed. The trial court expressed concern about Father's ability to facilitate the girls' relationship with Mother. It noted that, although Father did a good job of providing for the children's physical needs and some of their emotional needs, he was "one of the worst perpetrators of mental-health problems on [the] children." The trial judge described Father as "one of the worst offenders [the court has] ever had." The trial court modified its previous order, and ordered that the children reside with Mother during the school year and with Father during the summer. On October 11, 2004, the trial court entered a written order

consistent with its oral ruling and set out child support payments and telephone visitation. From that order, Father now appeals.

On appeal, Father argues that the trial court erred in designating Mother as primary residential parent. He claims that there was no change in circumstances, and that the trial court failed to engage in a comparative fitness analysis once it found a change in circumstances. In addition, Father asserts that Mother filed a false affidavit in support of her motion to strike Dr. McLaughlin's report; he argues that the trial court's decision to designate Mother as primary residential parent rewards her false affidavit, and that Mother's petition for a change in residential placement should have been denied based upon her "unclean hands." Father further claims that the trial court should have granted his motion in limine to dismiss Mother's petition based on her failure to file a proposed parenting plan within forty-five (45) days prior to the trial date. Finally, Father argues that the trial court erred in finding him guilty on three counts of criminal contempt. In her appeal, Mother argues that the trial court erred in failing to award her attorney's fees at trial, and she requests attorney's fees on appeal.

The trial court's findings of fact are reviewed *de novo* on the record, presuming those findings to be correct unless the preponderance of the evidence is otherwise. **Kendrick v. Shoemaker**, 90 S.W.3d 566, 570 (Tenn. 2002); **Hass v. Knighton**, 676 S.W.2d 554, 555 (Tenn. 1984); Tenn. R. App. P. 13(d). The trial court's conclusions of law are reviewed *de novo*, with no such presumption of correctness. **Kendrick**, 90 S.W.3d at 569–70.

When a parent files a petition to change the designation of primary residential parent, that parent has the burden of showing that a material change in circumstances has occurred which makes a change in residential placement in the child's best interest. **Blair v. Badenhope**, 77 S.W.3d 137, 148 (Tenn. 2002). Thus, the decision regarding such a petition involves a two-part test. First, as a "threshold issue," the trial court must determine whether there has been a change in circumstances since the last custody determination. There is no bright-line rule for determining whether such a change in circumstances has occurred. However, relevant considerations include whether the change (1) has occurred after the entry of the last order sought to be modified; (2) was not reasonably anticipated when the last order was entered; and (3) is one that affects the child in a meaningful way. **Cranston v. Combs**, 106 S.W.3d 641, 644 (Tenn. 2003); **Kendrick**, 90 S.W.3d at 570; **Blair**, 77 S.W.3d at 150. If a material change in circumstances has occurred, the trial court must then proceed to the second step in the analysis and determine whether modification of the residential placement is in the child's best interest, in light of the factors enumerated in Tennessee Code Annotated § 36-6-106. Those factors are as follows:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or

child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;

(4) The stability of the family unit of the parents;

(5) The mental and physical health of the parents;

(6) The home, school and community record of the child;

(7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, [as defined in § 39-15-401 or § 39-15-402], or child sexual abuse, [as defined in § 37-1-602], against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

(10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

T. C. A. § 36-6-106(a) (2005). In addition, “[a]lthough evidence of substantial harm or harm to the child is certainly relevant to the trial court’s determination, the analysis to be applied under *Kendrick* does not require a finding of harm or substantial harm to establish a material change in circumstances.” *Cranston*, 106 S.W.3d at 645.

In this case, Father argues, the trial court erred in finding that a material change in circumstances had occurred since the entry of the June 13, 2001 agreed order designating him as primary residential parent for the children. He contends that this case presents a situation similar to that in *Brumit v. Brumit*, 948 S.W.2d 739 (Tenn. Ct. App. 1997). In *Brumit*, the parties agreed that the mother would be the primary residential parent for the parties’ daughter. Post divorce, the mother remarried and moved from Tennessee to Jacksonville, Florida. This necessitated a change in the father’s visitation arrangement. *Brumit*, 948 S.W.2d at 740. Afterwards, problems arose between the parties regarding the father’s visitation, and the father filed a petition for joint custody asserting that the mother interfered with his visitation. The trial court denied the father’s petition for joint custody but found the mother in contempt of court, giving her a suspended sentence of incarceration. The appellate court affirmed the decision of the trial court. *Id.* at 740-41. The appellate court noted that the only basis for a change in residential placement was the mother’s alleged interference with the father’s visitation and her denigration of his role as the child’s father. The court reasoned that,

to the extent that the record supported the father's allegations, the trial court remedied the situation by use of its contempt power. "Beyond this conduct, there was no evidence that the circumstances of the parties and their child had changed since the divorce in a way that would require a change in the basic custodial arrangement." *Id.* at 741. The appellate court noted that the absence of a cooperative spirit between the parties made a joint custody arrangement inappropriate. *Id.*

Mother asserts that the situation in this case is similar to the facts presented in *Cranston v. Combs, supra*. In *Cranston*, the parents of two minor children divorced, and the parties agreed that the mother would be the primary residential parent of the children. Two years later, the father filed a petition to be designated primary residential parent, claiming that the mother's interference with his visitation constituted a material change in circumstances sufficient to warrant a change in the children's residential placement. He alleged that the mother refused to allow the children to call him, would not allow him to speak to the children when he called, erased telephone messages that he left for the children, reported to them that he had not called when he had, failed to deliver birthday gifts to the children, and insisted that her children call her new boyfriend "Dad." *Cranston*, 106 S.W.3d at 642. The parties resolved their disputes, and the trial court entered a consent order on the parties' visitation arrangement. Two years later, the father filed a second petition to be designated primary residential parent, alleging that despite the parties' consent order, the mother had continued to obstruct his visitation. The trial court determined that mother's interference with the father's relationship with the children constituted a substantial risk of harm to the children such that a change in residential placement was justified. *Id.* at 642-43. On appeal, the intermediate appellate court reversed, finding that the parties' "bickering" over visitation issues did not constitute a material change in circumstances that presented a threat of substantial harm to the children. *Id.* at 642. The Supreme Court granted the father permission to appeal.

On appeal, the Supreme Court determined that both of the lower courts had erred in determining that a finding of substantial harm was necessary to establish a material change in circumstances. The Court found that the record was sufficient to analyze whether the requisite change in circumstances had occurred, under the appropriate standard. *Id.* at 645. The Supreme Court noted the trial court's findings that the mother had engaged in a "deliberate pattern of consistent interference with [the father's] court-ordered visitation rights," she had interfered in telephone conversations, refused to speak to the father or provide him with relevant information about the children, and she made derogatory remarks about the father in front of the children. Although a finding of substantial harm was not required, the Court reasoned, it was relevant to the inquiry. Under the facts presented, the Court held that a material change in circumstances had occurred that affected the children's well being. *Id.* The Court further concluded that the change in circumstances justified a change in custody to the father. The Court noted that the trial court had had the opportunity to evaluate the testimony and assess the credibility of the witnesses. From the evidence, the trial court had concluded that, while both parents were fit, the father was more fit. By giving custody of the children to the father, the Court found, the children would have an opportunity to establish a relationship with him. *Id.* at 646.

On balance, we find this case more similar to *Cranston, supra*, than to *Brumit, supra*. When the consent order in this case was executed in June 2001 designating Father as primary residential parent, the parties were cooperating with each other to the extent that Mother was even permitted to stay with the children in Father's home during her visits in Tennessee. The parties' relationship changed in the fall of 2002, and the parties "dug in their heels" and ceased cooperating. After that, in the space of less than eighteen months, at least four hearings were held on Mother's allegations that Father continued to interfere with her visitation with the children. During this time, at least five orders were entered by three different judges, each with an increasingly ominous tone, warning Father of the consequences of continuing to interfere with Mother's visitation. The record shows that the conduct by Father, and at times by Stepmother, was heavy-handed and overbearing, repeatedly insulting and hanging up on her and even utilizing fellow police officers in an apparent effort to intimidate her. The orders were increasingly specific, requiring that Mother be permitted unimpeded visitation by telephone during specified times. Instead of taking this as the warning to him that was obviously intended, Father appeared to view the orders as limits on Mother's telephone visits, limits that he was authorized to enforce by any means, repeatedly speaking to her in a sharp, contemptuous manner while in the home with the children, and even going so far as to grab the telephone out of his child's hand, admonish Mother that it was "not her night to call" and peremptorily hang up on her.⁴ Mother reacted to the situation imperfectly, and her resulting appeals for the children's loyalty created more pressure on them. Not surprisingly, the children responded to the distressing change in their parents' behavior by becoming nervous and either choosing sides or trying to appease both.

The trial court in this case determined that Father and Stepmother "advertently attempted to alienate the affection of the children from their biological mother. The Court finds that this behavior is detrimental to the healthy development of these children." The record supports this finding. The trial court found that the conduct by Father and Stepmother caused emotional harm to the children, and that numerous court orders had done nothing to curb this behavior. The record supports the findings of the trial court in this regard as well. Thus, we affirm the trial court's finding that a material change in circumstances occurred that adversely affected the well-being of the children.

Father also contends that the trial court failed to conduct a proper comparative fitness analysis. We disagree. The trial court is not required to expressly address each of the statutory factors to be considered. *Darvarmanesh v. Gharacholou*, No. M2o004-00262-COA-R3-CV, 2005 WL 1684050, at *4 (Tenn. Ct. App. July 19, 2005). The record contains substantial evidence on both sides of the issue, and the question is a close one, as evidenced by the trial court's initial, hastily-remedied decision to have the children split the year between the parties. Certainly, some of the factors in Section 36-6-106(a) weigh in favor of Father, particularly continuity of placement. Dr. McLaughlin's evaluation emphasized this factor, noting that the children were overall doing well in their Tennessee schools and recommending continued residential placement with Father. Other factors, however, weigh in Mother's favor. The trial court was obviously concerned with Stepmother's character and

⁴In his testimony, Father indicated that he later apologized to Olivia because he was mistaken about which night was designated for Mother to call. He did not indicate in his testimony that he acknowledged to her that such behavior was unacceptable regardless of the night the call took place.

behavior, which is a factor to consider under the statute. *See* T.C.A. §§ 36-6-106(a)(4), (a)(9) (2005). The children lived with Mother for over three years in New York before she agreed to designate Father as primary residential parent, and there was no evidence that this decision resulted from any concerns regarding Mother's competence as a parent. Much of the children's extended family, on both sides, lives near Mother in New York. Mother and Stepfather have the means to provide a stable home for the children.

Obviously, though, the main reason for the trial court's decision was its finding that Father attempted to obstruct the children's relationship with Mother. In contrast to Father, Mother has not engaged in efforts to obstruct the children's relationship with Father. The trial court stated, "The number one factor in determining any custody case is how each parent facilitates visitation and contact with the other. The Court is very concerned about Father's inability to share the children with their Mother. He has attempted to alienate the affections of Mother." This finding is borne out by the evidence.

Without question, moving the children back to New York and designating Mother as primary residential parent was a drastic measure, uprooting the children from friends and school. It was a measure that could have been avoided had Father modified his behavior to comply with the multiple court orders. Unfortunately, his obstinate refusal to do so left the trial court with the unenviable choice of either moving the children or standing by idly while one parent crippled the children's relationship with the other parent. With one parent living far from the other, cooperation by the primary residential parent in preserving the children's relationship with the other parent is crucial. The record shows clearly that Father had made a decision not to do so, regardless of any orders or warnings by the trial court. Overall, we cannot conclude that the trial court erred in finding that a material change in circumstances existed that necessitated designating Mother as primary residential parent.

Father contends that the trial court erred in designating Mother as primary residential parent, asserting that the affidavit filed by Mother in support of her motion to strike Dr. McLaughlin's evaluations contained false statements. Because of this, Father argues, Mother has unclean hands and should not benefit from her improper behavior. Father does not identify what statements made by Mother were false, nor does he cite to any portion of the record in his argument on the point, noting only that Mother invoked the fifth amendment privilege against self-incrimination in her testimony at trial. The trial court denied Mother's motion to strike Dr. McLaughlin's evaluation, so apparently Mother's affidavit made little difference. In any event, whether a parent is guilty of unclean hands is not controlling. *Haynes v. Haynes*, 904 S.W.2d 118, 120 (Tenn. Ct. App. 1995). The designation of primary residential parent is made from an evaluation of the child's overall best interest, not as a method of rewarding or punishing one parent or the other. Father's argument must be rejected.

Father argues that the trial court erred in denying his motion in limine to dismiss Mother's motion for a change in custody due to her failure to file a proposed parenting plan pursuant to Tennessee Code Annotated § 36-6-404(a)(3). That statute provides:

If the parties have not reached an agreement on a Permanent Parenting Plan on or before Forty-Five (45) days on or before the date set for trial, each party shall file and serve a Proposed Permanent Parenting Plan even though the parties may continue to mediate and negotiate. Failure to comply by a party may result in the Court's adoption of the plan filed by the opposing party if the Court finds such a plan to be in the best interest of the party.

T.C.A. § 36-6-404(a)(3) (2005). Because the statute states that a each party "shall" file a parenting plan under the statute, Father contends, Mother's failure to do so until the beginning of trial should have resulted in the dismissal of her petition. However, the second sentence of the statute describes the consequence of a party's failure to comply with the section; such a failure to comply "may result in the Court's adoption of the plan filed by the opposing party" The trial court in this case exercised its discretion under the statute, and its failure to adopt Father's parenting plan was not reversible error.

In addition, Father argues that the trial court erred in finding him guilty on three counts of criminal contempt. While he admits that he prematurely cut short telephone calls between Mother and the children on two occasions, Father claims that one instance was based on mistake, and the other one was necessary because Mother was inappropriately punishing Stephanie. Based on the record as a whole, Father argues, the evidence was insufficient to convict him of any counts of contempt.

When the sufficiency of the evidence for a conviction of criminal contempt is raised on appeal, the appellate court "must review the record to determine if the proof adduced at trial supports the findings of the trier of fact beyond a reasonable doubt." *Black v. Blount*, 938 S.W.2d 394, 399 (Tenn. 1996). The appellate court does not reweigh the evidence and

will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt.

Id.

In this case, the trial court found Father guilty on three counts of criminal contempt. It did not detail which instances were deemed in violation of the court's orders. From our careful review of the record as a whole, it is apparent that Father acted contrary to the trial court's explicit orders on more than three occasions. The trial court was well within its authority to reject Father's rationalizations for his misconduct. Overall, we conclude that the record contains sufficient evidence upon which the trial court could have found Father guilty of three counts of criminal contempt beyond a reasonable doubt.

The trial court below ordered that each party pay their respective attorney's fees, and that Father pay court costs because he was held in criminal contempt. Mother argues on appeal that the trial court erred in failing to grant her attorney's fees at trial because she prevailed on the issues of custody and criminal contempt, and because Father's repeated interference with her visitation necessitated the escalation of the proceedings. Tennessee Code Annotated § 36-5-103(c) provides that a trial court may award attorney's fees to a prevailing party in a custody or change of custody matter.⁵ T.C.A. § 36-5-103(c) (2005). Because an award of fees under this statute is discretionary with the trial judge, we review the trial court's decision on such matters for an abuse of discretion. *Kesterson v. Varner*, 172 S.W.3d 556, 573 (Tenn. Ct. App. 2005). While a prevailing party's ability to pay is a factor to consider in making such a determination, it is not the controlling factor. *Brown v. Brown*, No. W2005-00811-COA-R3-CV, 2006 WL 784788, at *5 (Tenn. Ct. App. Mar. 29, 2006). "The purpose of these awards is to protect the children's, not the custodial parent's, legal remedies." *Id.* Clearly, Mother was required to resort to legal measures to enforce her visitation. However, she made over one hundred claims of criminal contempt against Father that were voluntarily dismissed or were found to be unwarranted. The trial court noted that Mother was not without fault in the deterioration of the parties' relationship and the resulting litigation. Considering the circumstances of this case as a whole, we find no abuse of discretion in the trial court's decision to order each party to be responsible for his or her own attorney's fees.

Mother also argues that she is entitled to attorney's fees incurred in this appeal. Whether to award attorney's fees on appeal is within the sound discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). Mother's request is denied.

The decision of the trial court is affirmed. Costs on appeal are to be assessed to Appellant Mitchell E. Kornberg, and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE

⁵That statute provides:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

T.C.A. 36-5-103(c) (2005).